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10 Attorneys for Defendants
11 ETHICON, INC. (on its own behalf and behalf of its
12 Division, ETHICON WOMEN'S HEALTH &
13 UROLOGY, and erroneously sued as GYNECARE,
14 INC.); and JOHNSON & JOHNSON

15 UNITED STATES DISTRICT COURT
16 SOUTHERN DISTRICT OF CALIFORNIA

17 DIANE McIRVIN,

18 Plaintiff,

19 v.

20 GYNECARE, INC., et al,

21 Defendants.

22 Case No. 11cv844-JLS (MDD)

23 **JOINT MOTION TO ENTER ORDER RE
24 STIPULATED DISMISSAL OF
25 PLAINTIFF'S COMPLAINT WITHOUT
26 PREJUDICE**

27 Judge: Hon. Mitchell D. Dembin

28 Removal Filed: February 15, 2011

18 Pursuant to CivLR 7.2 the parties hereby file this joint motion and request that the Court
19 enter an order as set forth in the stipulation below:

20 WHEREAS, counsel for Plaintiff Diane McIrvin has requested that counsel for
21 Defendants Ethicon, Inc. and Johnson & Johnson enter into negotiations regarding the response of
22 Defendants to an anticipated motion of Plaintiff to dismiss the above-captioned litigation pursuant
23 to Federal Rule of Civil Procedure 41(a)(2) without prejudice for the purpose of re-filing the
24 above-captioned action in the state courts of New Jersey; and

25 WHEREAS, counsel for Plaintiff also represents eleven (11) other Plaintiffs who have 11
26 similar lawsuits that are pending against Defendants Ethicon, Inc. and Johnson & Johnson in
27 Federal or State court of six different States, viz., the States of California, Indiana, Maryland,
28

1 Missouri, New Mexico, and Washington, with 10 of those suits pending in federal district court;
 2 and

3 WHEREAS, counsel for Plaintiff has indicated that said counsel would file similar
 4 motions to dismiss without prejudice in ten (10) pending federal district court actions all for the
 5 purpose of re-filing each one of those actions in the state courts of New Jersey; and

6 WHEREAS, counsel for Plaintiff has requested that counsel for Defendants consider a
 7 global resolution of how the Plaintiffs and Defendants may reach a mutual stipulation and
 8 agreement regarding the dismissal without prejudice of all eleven (11) lawsuits, thereby
 9 facilitating the dismissal of those actions and conserving the resources of the Federal judicial
 10 system; and

11 WHEREAS, the “primary purpose of Rule 41(a)(2) is to protect the interests of the
 12 defendant, although the court should weigh the equities and do justice to all the parties in the
 13 case” and therefore, a “dismissal without prejudice should be denied when the defendant will
 14 suffer ‘plain legal prejudice’ but should normally be granted in the absence of such prejudice,”
 15 *see* 8 Moore’s Federal Practice ¶ 41.40[5][a], at p. 41-141 (3d ed. 2010); and

16 WHEREAS, counsel for Defendants have indicated the willingness of Defendants to enter
 17 into negotiations that would result in the dismissal without prejudice of the foregoing eleven (11)
 18 lawsuits so long as the relative legal positions that exist between the parties in each of the eleven
 19 (11) lawsuits will not be prejudiced either now upon dismissal or when counsel for the eleven
 20 (11) Plaintiffs re-file their current lawsuits in any subsequent judicial forum; and

21 WHEREAS, Plaintiffs have agreed that the legal status quo that now exists between the
 22 parties in their separate pending lawsuits should be preserved and maintained in any future
 23 proceeding that is re-filed by any Plaintiff against Defendants; and

24 Plaintiff Diane McIrvin and Defendants Ethicon, Inc. and Johnson & Johnson therefore
 25 mutually STIPULATE and AGREE to the conditional dismissal of Plaintiff’s Complaint without
 26 prejudice, and in accordance with the terms of their MUTUAL AGREEMENT and
 27 STIPULATION, request the Court ORDER as follows:

28 1. The Complaint of Plaintiff is hereby conditionally dismissed without prejudice

1 subject to (a) Plaintiff agreeing and stipulating that the conditions set forth in this paragraph and
 2 paragraphs 2-12 below shall be imposed in any and all lawsuits that Plaintiff subsequently files
 3 against Defendants or either of them (“Defendants”) in any state or federal court located in any
 4 state, territory, or possession of the United States of America or in any court in the District of
 5 Columbia related to the subject matter of Plaintiff’s Complaint filed in the case sub judice
 6 (“Plaintiff’s subsequent lawsuit”) and (b) that the parties’ compliance with the terms of the
 7 settlement contract shall be one of the material terms of their contract and this order.

8 2. The time of filing Plaintiff’s subsequent lawsuit shall be deemed to be the time of
 9 filing Plaintiff’s original action against Defendants for purposes of calculating the limitations
 10 period that applies to Plaintiff’s claims, rather than the actual date when Plaintiffs file their
 11 subsequent litigation in New Jersey. Any statute of limitations, prescription, or repose that
 12 applies to Plaintiff’s Complaint filed in the case sub judice, if shorter in duration than any other
 13 statute of limitations, prescription, or repose that may apply in Plaintiff’s subsequent lawsuit,
 14 shall apply in Plaintiff’s subsequent lawsuit in lieu of any other statute of limitations,
 15 prescription, or repose.

16 3. Any state statute that places a cap, ratio, or other limitation upon the amount of
 17 non-economic damages or the amount of punitive damages that may be recovered by Plaintiff and
 18 applies to Plaintiff’s Complaint filed in the case sub judice, if lower than the amount of the caps,
 19 ratios, or other limitations contained in any such state statute, if any, that may apply in Plaintiff’s
 20 subsequent lawsuit, shall apply in Plaintiff’s subsequent lawsuit in lieu of any other such state
 21 statute.

22 4. Plaintiff(s) shall not file Plaintiff’s subsequent lawsuit without first producing to
 23 counsel for Defendants copies of medical records and hospital records of Plaintiff which allegedly
 24 show that Plaintiff was allegedly implanted with one or more medical devices manufactured by
 25 Defendant Ethicon, Inc., including the physician’s notes of each one of Plaintiff’s implanting
 26 surgeons and treaters whom Plaintiffs consulted about the conditions leading to Plaintiff’s
 27 surgery(ies).

28 5. The Order of the United States District Court for the Northern District of

1 California which severed the parties to the original action in which Plaintiff was a party and
 2 transferred the Plaintiff's claims to this District Court ("Order to sever and transfer"), Order
 3 Granting Defendants' Motion to Sever Under Rule 21 and Transfer Under 28 U.S.C. § 1406(a) or,
 4 in the Alternative, 28 U.S.C. § 1404(a), (Apr. 6, 2011), was an appealable order to the United
 5 States Court of Appeal for the Ninth Circuit under 28 U.S.C. § 1291. *See Coughlin v. Rogers*,
 6 130 F.3d 1348, 1349 (9th Cir. 1997). Because the time within which Plaintiff may take an appeal
 7 from the Order to sever and transfer has run, *see Fed. R. App. Pro. 4(a)(1)(A)*, the Order to sever
 8 and transfer is now final and is res judicata between Plaintiff and Defendants as to those issues
 9 decided by said Order to sever and transfer. Accordingly, the final Order to sever and transfer
 10 will not be treated as a nullity and will not be vacated by this District Court as a result of its
 11 conditional dismissal of this action, *see National R.R. Passenger Corp. v. International Ass'n of*
 12 *Machinists & Aerospace Workers*, 915 F.2d 43, 48 (1st Cir. 1990), and the Order to sever and
 13 transfer is entitled to be given *stare decisis* effect in any forum.

14 6. Upon being served with a summons and complaint and when answering or
 15 otherwise responding in the manner required by law in Plaintiff's subsequent lawsuit, Defendant
 16 may also assert and allege any other defenses that are available under the laws of the forum State
 17 in which Plaintiff's subsequent lawsuit is filed.

18 7. The parties agree that it would be difficult to calculate actual damages, beyond
 19 recovery of costs and attorneys' fees, arising from a material breach of this Agreement. As such,
 20 the parties agree that in the event either party breaches this Agreement, which governs the
 21 disposition and dismissal of eleven (11) lawsuits, the breaching party shall be subject to one, but
 22 only one, legal action for said breach and shall pay to the non-breaching party the sum of \$15,000
 23 as liquidated damages. The parties agree that this amount constitutes a reasonable estimate of
 24 damages and that this amount does not constitute and should not be construed as a penalty.

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The failure of Plaintiff or her counsel to adhere to any of the preceding conditions is a material breach of her MUTUAL AGREEMENT AND STIPULATION with Defendants.

Dated: September 19, 2011

DRINKER BIDDLE & REATH LLP

By: /s/ Michelle A. Childers
Michelle A. Childers

Attorneys for Defendants
ETHICON, INC. (on its own behalf and behalf
of its Division, ETHICON WOMEN'S
HEALTH & UROLOGY, and erroneously
sued as GYNECARE, INC.); and JOHNSON
& JOHNSON

Dated: September 19, 2011

GIRARDI | KEESE

By: /s/ Amanda Kent (With Permission)
Amanda Kent

Attorneys for Plaintiff
DIANE McIRVIN